SUPREME COURT, U. S.
No. 381

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner*,

v.

NEEDHAM PACKING COMPANY, d/b/a SIOUX CITY DRESSED BEEF, a Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

This Brief is filed on behalf of Needham Packing Company, d/b/a Sioux City Dressed Beef ("Needham") in opposition to the Petition for a writ of certiorari to the Supreme Court of Iowa, filed by Local

Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO ("Union"). The Petition was filed on July 17, 1967.

QUESTIONS PRESENTED

In framing the questions presented, the Union has attempted to disguise and subvert the true import and holding of the Supreme Court of Iowa. It implies that the state court ignored the prior mandate of this Court and resolved adversely to the Union issues which this Court had previously decided in the Union's favor. That such was not the case is plainly evident from the opinion of the state court.

The state court strictly confined its inquiry to a legal determination of whether the collective bargaining agreement between the parties conferred upon the arbitrator the authority to make the award he made.* Solely on the basis of the arbitrator's own findings and conclusions, the state court denied enforcement of the award on the grounds that the arbitrator lacked jurisdiction and exceeded his authority in making the award he made. The scope of the state court's inquiry and its decision were wholly in accord with principles enunciated by this Court in previously adjudicated cases. Thus, Respondent respectfully submits, no unresolved question respecting the administration of the Federal labor laws is presented by the Petition.

The only questions that might be said could properly be presented are whether parties can be compelled to

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* Obviously, any such determination was not dealt with by this Court in its prior consideration of this proceeding because the arbitrator had not even rendered his decision and award at that time.

arbitrate a controversy they have not agreed to arbitrate and whether courts are foreclosed from reviewing an arbitrator's determination that the parties have agreed to submit a controversy to arbitration. These questions, Respondent respectfully submits, have already been answered by this Court in the negative.

STATEMENT

This proceeding arises out of a controversy between the Union and Needham beginning in May, 1961. In the prior litigation before this Court, neither the Union nor Needham set forth in their pleadings the details of the controversy. The Union had alleged that Needham refused to process the two grievances. Needham defended and counterclaimed on the grounds that the Union had violated the contract's no-strike clause. The Union had denied any such violation. See Record in prior litigation, *Packinghouse Workers* v. *Needham Packing Co.*, No. 102, October Term, 1963, 376 U.S. 247.

Needham is engaged principally in the meatpacking business. It operates packing plants for the slaughter of livestock and the processing of meats and animal products and by-products. The Union was the bargaining representative of employees of Needham under a collective bargaining agreement dated October 1, 1960.

On May 11, 1961, Anton Stamoulis, the shop steward, protested the assignment of the assistant foreman to work on the production line as being in violation of the bargaining agreement. The foreman advised Stamoulis to follow the grievance procedure under the collective bargaining agreement, and informed him that he would be discharged "if he stopped the chain."

Upon the signal by Stamoulis, the chain was stopped. Stamoulis was thereupon discharged. (A.D. 9-10(16)(17).)*

Later in the day, production was resumed while the Union and Needham met to discuss the Stamoulis dismissal. When Needham refused to reinstate Stamoulis unless ordered to do so by an arbitrator,** production stopped and the officers of Local 721 and virtually all of the bargaining unit employees walked out together

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* "Pet." references are to the Petition. "Pet. App." references are to the opinion of the Supreme Court of Iowa which has been filed with this Court as an Appendix to the Petition. "A.D." references are to the Arbitration Board Decision and "R." references are to the printed record prepared for the Iowa Supreme Court, both of which have been filed with this Court by the Petitioner. The Arbitration Board Chairman wrote the majority opinion and made the award. He will be referred to hereinafter as the arbitrator (see Pet. App. 18).

** Under the collective bargaining agreement Needham could not request arbitration (A.D. 22). The arbitrator's powers were limited as follows:

> "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of [sic] application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union. . . . Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract." (A.D. 22.)

And the agreement also provided:

> "This instrument constitutes the entire contract between the parties hereto, and the Company, the Union, and its members will abide by it. Its provision and the rights of the parties shall in no way be altered by reason of any by-laws, rules, regulations or customs of the Union. The Company shall not be bound to grant any additional demands which may be made by the Union upon the Company, except to comply with the terms hereof." (A.D. 24.)

in contract violation (A.D. 10(18)).* Before the walk-out the Union Executive Committee told Needham that the Union wasn't going to arbitrate every little thing that came up (A.D. 9(13)). As the employees left the plant they were warned individually that their conduct would be subject to disciplinary action. Several notices were posted indicating there would be work on Friday, May 12. No employees reported for work. (A.D. 10(18).)

In conferences on Friday, May 12, Needham's president told the Union's International representative Hart that he did not intend to shut down the plant and couldn't wait much longer before starting to hire replacements.** He also advised Hart that satisfactory replacements would not be let go to make room for strikers if they later returned to work. (A.D. 10(19).) At a Union meeting during the evening of May 12, the strikers opposed the return to work (A.D. 10(20).) That same evening Needham's president sent a letter to each striker which, among other things, advised him that:

> "Any proper grievance can be adjusted under the grievance procedure in the contract. * * *
>
> "I told Mr. Hart [International Union representative] that we want the men to report in Saturday, and that if they did not, we would hire other men. I hope you will return to work immediately. ANY NEW MEN HIRED WILL NOT BE DISMISSED TO MAKE ROOM FOR YOU SHOULD YOU DECIDE TO RETURN TO WORK LATER." (A.D. 11(20).)

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* The strike was not an unauthorized wildcat of a few employees but was undertaken in all its phases pursuant to firm Union policy.

** As Mr. Gilker testified: "[The Union] had us over a million dollar barrel. A million dollars worth of products spoiling. We had to get in operation." (A.D. 48.)

On Monday, May 15, when none of the strikers reported for work, Needham advertised for replacements, and 65 new hires reported for work Tuesday morning, May 16 (A.D. 12(22); Pet. App. 26). Additional new hires were made during the day (A.D. 56-57). Needham thus undertook a replacement program when it had a clear legal right to do so (A.D. 89; Pet. App. 30). Needham also made it clear to Hart on Friday, May 12, and it is undisputed that throughout this controversy between the Union and Needham, Needham has consistently maintained that it would not tolerate another "Wilson situation" (A.D. 29(12)).*

Needham's initiation of hiring prompted the Union to initiate conversations with Needham representative Gilker for the purpose of reaching a strike settlement agreement for the return of the strikers to work (A.D. 89 (2d full para.), 90(1)(2)). On the night of May 16 pursuant to International representative Hart's in-

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* In the "Wilson situation," the employer secured permanent replacements for striking employees under a promise to the replacements that they would not be dismissed upon any strike settlement. Thereafter, the union and the employer entered into a written strike settlement agreement which included an arbitration clause conferring jurisdiction upon an arbitration panel to resolve, among other things, any dispute "relating to the status of strikers and of employees hired as replacements since the strike." When the controversy was arbitrated, it was concluded that all the strikers should be restored to their jobs with seniority and the replacements hired during the strike discharged. See *Bixby* v. *Wilson & Company*, 196 F. Supp. 889 (N.D. Iowa 1961).

The arbitration clause in *Bixby-Wilson* included the following:

> "The Board of Arbitration shall have the power to decide, in the light of all the equities and all facts and considerations deemed by the Board to be relevant, the fair and proper disposition of all issues in respect to all employees affected by the controversy between the parties as above described . . . ." 196 F. Supp. at 891.

structions to Davidchik (the Union's District representative), the membership met and voted to return to work the next day on terms which Davidchik understood from Hart had been verbally agreed upon that same morning on the phone between Hart and Gilker (A.D. 80 (4th full para.)). Hart's understanding of the "agreed upon terms" was that all employees except Stamoulis would return to work with full seniority and without discrimination (A.D. 43; Pet. App. 26); that is, on an all-or-none, forgive-and-forget basis.

When later that evening the president of Needham was informed by Davidchik of the vote and the conditions upon which the strikers agreed to return to work, he advised Davidchik that Needham would not reinstate the strikers on the Union's terms, but would employ the strikers as new hires only (A.D. 90; Pet. App. 27).*

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* When the matter reached the Supreme Court of Iowa, the court concluded that the arbitrator had made no finding as to the specific terms of a strike settlement agreement, but that he did find that such terms, whatever they were, were breached or repudiated by Needham on the night of May 16 (Pet. App. 32, 35). Because of such "breach and repudiation," the arbitrator concluded that the striking employees were improperly deprived of seniority (A.D. 93; Pet. App. 36). But the Union at no time in these proceedings took the position that the men were improperly deprived of seniority. It took the position that they were improperly discharged because Needham repudiated "agreed upon terms" upon which the men would be taken back. (A.D. 79.) Under provision 19 (c)(1) of the collective bargaining agreement (A.D. 23), an employee who is discharged for cause loses all seniority rights when re-employed.

The importance of this is that in awarding backpay the arbitrator obviously failed to properly execute the award he made because neither the Union or any individual striker at any time made an unconditional offer to come back to work and grieve their differences, either before May 16 or thereafter. The Iowa Supreme Court did not have to reach the issue whether the award was properly executed.

The dispute over the "agreed upon terms" persisted the next day, May 17. The Union maintained in hot and angry phone conversations, that Needham had repudiated the "agreed upon" strike settlement terms; that the repudiation was a "double-cross" on a commitment made that every employee but Stamoulis could return without any discrimination. (A.D. 14(25), 52-54.) It was by reason of this "fiery conversation" of May 17 that the arbitrator concluded that Needham "knew full well" at all times the nature of what was being grieved (A.D. 93 (4th para.)).

The strikers did not report for work May 17. Needham continued its announced policy of hiring new men. Starting May 17, and until enjoined by the district court, the Union and its officers changed from peaceful picketing to mass picketing, harassment of men reporting to work, car stopping and tipping, including throwing rocks and tiles into private homes of employees at night (A.D. 14(24), 84 (5th para.), 93 (3d para.); Pet. App. 27). On May 24 Needham filed unfair labor practice charges with the NLRB, and a day later the Union filed countercharges alleging strikers were discharged on or about May 17 by reason of a lockout and replacement program (A.D. 17(29)). On June 20 the Union entered into an NLRB settlement agreement with a non-admission clause agreeing to refrain from the same kind of misconduct from which it had been enjoined by the district court. The Union thereafter withdrew its countercharges against Needham. (A.D. 17(29).)

It was only when this continuing misconduct and economic pressure—combined with efforts to secure third-party mediation—"proved unavailing," that the Union "then resorted" to the grievance-arbitration

procedure on July 5, 1961 (A.D. 84 (last para.)).* Grievance No. 1-A related to the discharge of Stamoulis; Grievance No. 2-A requested the reinstatement of 185 named grievants with full seniority and full pay for all time lost "because of the fact they were improperly discharged." (Pet. App. 18.)** Needham refused to process the grievances. In August 1961 the Union filed a petition in the district court seeking an order directing arbitration of Grievance Nos. 1-A and 2-A and alleging that 191 employees had been improperly discharged on or about May 17, 1961. Although the Union in its NLRB charge also had alleged that the strikers had been discharged on May 17, it subsequently changed the alleged date of discharge in its petition to the district court to June 26, 1961. See Record in prior litigation, *Packinghouse Workers* v. *Needham Packing Co.*, No. 102, October term, 1963, 376 U.S. 247.

Pursuant to Rule 105 of the Iowa Rules of Civil Procedure, Needham sought a ruling on points of law on the basis of issues raised in the pleadings as to which there was no dispute. The district court denied the Union's petition to compel arbitration. This holding was affirmed by the Supreme Court of Iowa on the grounds that "the Union had waived its right to arbi-

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* Even after an attempt to resort to arbitration, the Union continued its unfair labor practice conduct. For example, another local of this International settled a secondary boycott charge involving this controversy after July 5, 1961 (A.D. 67).

** The Union at no time has related the list of grievants to the strikers. The arbitrator never reached the question of individual entitlement to reinstatement or eligibility because of his acceptance of the Union's thesis that Needham had agreed that every striker would be restored to his old job with full seniority (R. 5 (17-34), 6 (1-34), 7 (1-7)). Here again, the Supreme Court of Iowa did not have to reach the question of whether the award was properly executed.

trate the grievances filed by its walkout." 254 Iowa 882, 887, 119 N.W. 2d 141, 143.

On petition for certiorari, this Court held that Needham's defense and counterclaim that the Union breached the no-strike clause did not, on the basis of such facts as were undisputed on the pleadings, release Needham from its duty to arbitrate the Union's claim that the employees had been wrongfully discharged. 376 U.S. 247, 253. This Court expressly noted that the case reached it on bare pleadings and that there were factual matters yet to be resolved. It was in this "posture" and "perspective" and "almost entirely on the basis of the [collective bargaining] agreement itself," that this Court reversed the Supreme Court of Iowa.* 376 U.S. at 248, 250.

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* On the basis of the undeveloped record before it at that time, this Court expressly refrained from deciding "whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate." 376 U.S. at 253.

In his decision, the arbitrator concluded that there had been no such change as would release Needham from its obligation to arbitrate and that the Union's conduct did not constitute a waiver of its right to arbitrate (A.D. 92). Needham urged before the Supreme Court of Iowa that the refusal of the striking employees at all times to return to work and grieve their alleged disputes had brought about a fundamental change in the relationship of the parties prior to the demand for arbitration. Needham's position was that a fundamental change had taken place because the employees' refusal to work and grieve had thereby required Needham to completely restaff its plant with replacements.

Needham also urged before the Supreme Court of Iowa that the Union's misconduct and duress strategy to frustrate the grievance-arbitration procedure from May 16 until the Union realized that it could not bring Needham "to its knees" was in itself reason to deny judicial enforcement of the award. To hold otherwise would frustrate national labor policy favoring such a procedure for the

On the remand from this Court, the Supreme Court of Iowa immediately directed the Woodbury County District Court to enter an order directing arbitration without the taking of further evidence (Pet. 3). The Arbitration Board rendered its award and decision on July 23, 1965 (Pet. 4).

The arbitrator denied Grievance 1-A on the ground that the record sustained Needham's contention that the discharge of Stamoulis was for just cause, and the penalty of discharge was not excessive or arbitrary (A.D. 77).

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resolution of industrial strife. It would only encourage unions to keep an entire bargaining unit on strike in the hope that the company would succumb to its demands. It would encourage unions to resort to a second stage of illegality, over and above the breach of the no-strike clause, by engaging in breaches of local peace and order and unfair labor practices to prevent employees from working or the company from operating its plant where the sole objective is to achieve a settlement outside the terms of the collective bargaining contract.

On the other hand the employer has no effective remedy in the case of an illegal strike except to continue operations. Injunctive relief against the illegal strike itself is not available under Federal law. Problems of proof in damage actions are almost insurmountable. If the union's continued misconduct can bring about a settlement on its terms, rarely does a damage action survive. The situation in Needham was not unlike that prevalent in the meat packing industry in the Middle West in the early 1960's where there were massive union strikes accompanied by much force and violence in denigration of collective bargaining agreements and the national labor policy of arbitration as the substitute for industrial strife.

The Supreme Court of Iowa, in the decision of which review is here sought by the Union, found it unnecessary to decide the issue of fundamental change in view of its disposition of the proceedings. Additionally, Needham, in its Statement of Errors upon appeal to the state court (R. 3-8), raised other issues respecting the arbitrator's award which it claimed invalidated that award. The Supreme Court of Iowa also left these issues unresolved in its disposition of the case.

As to the discharge of the striking employees (Grievance 2-A), the arbitrator determined:*

1. Local 721, its officers and striking employees, unquestionably violated the no-strike clause by the illegal walkout, and the Union does not deny this (Pet. App. 29, 32).**

2. The strikers knew for certain between May 11 and May 16 that they were subjecting themselves to disciplinary action and new hires would not themselves be replaced as far as Needham was concerned (Pet. App. 30).

3. Needham had a legal right to discharge the striking employees, and at no time did the arbitrator say or conclude that discharge was an excessive penalty for the illegal walkout of May 11 (Pet. App. 33, 34).

4. Needham was on firm, solid ground from the legal standpoint when it began to exercise its right to hire on Monday, May 15, 1961, and the Union knew this (Pet. App. 30).

5. Needham had brought in at least 65 replacement men prior to the facts which gave rise to the present controversy (Pet. App. 26).

Notwithstanding the foregoing findings and conclusions, the arbitrator further determined that by reason of the negotiation by Hart and Gilker of "agreed upon terms" for settling the strike and recalling the strikers, Needham became culpable when it breached or repudi-

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* These determinations are extracted from the decision of the Supreme Court of Iowa which in turn had relied solely on the conclusions and findings of the arbitrator.

** The Union denied the violation in its pleadings in the prior litigation. 376 U.S. 247, 249.

ated these alleged "agreed upon terms." The arbitrator thus concluded that because of this independent and separate strike settlement agreement, the dispute over the terms under which the strikers could return to work was itself arbitrable (Pet. App. 33, 35). In short, the arbitrator concluded that he could "arbitrate" the existence, scope and effect of the separate agreement arising outside the "provisions" of the collective bargaining agreement and base his award upon it. The Union structured its dispute, and the arbitrator his award and decision, upon this separately negotiated agreement (Pet. App. 32).

The arbitrator entered an award sustaining Grievance 2-A. He ruled that all the persons named in the Grievance must be reinstated by Needham with full seniority and all contract rights restored. The arbitrator also awarded back pay from May 11, 1961, the date upon which the strike commenced, to the effective date of each grievant's reinstatement,* but he imposed a six months' disciplinary layoff beginning May 11, 1961, to November 11, 1961. (A.D. 94-95.)

Needham petitioned to the Woodbury County District Court to vacate the award or to interpret it. The Union cross-petitioned for enforcement and appointment of a hearing referee. The District Court ordered enforcement of the award.** (R. 50-52) Needham

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* The award also tolled the back pay provisions for certain periods of time during which the issues were in litigation in the courts (A.D. 95).

** It had, however, interpreted the award so that "in computing pay under the award, there shall be deducted the interim earnings for the period of time for which back pay is awarded each employee reinstated under the award." (R. 46, 47.)

posted a supersedeas bond in the amount of $1,250,000 and appealed to the Supreme Court of Iowa (R. 58).

The Supreme Court of Iowa reversed. Recognizing that a court is not permitted to "re-examine the merits of the arbitration decision," the state court reviewed the question of the arbitrator's authority to decide the issue he decided and to make the award he made on the basis of findings and conclusions of the arbitrator (Pet. App. 29). From this limited review, it determined that the authority of the arbitrator to make the award could only be drawn from the "agreed upon terms" of the strike settlement agreement. That agreement, as the court noted, contained no provision for arbitrating a dispute over the terms of the return to work after an illegal strike; nor did the collective bargaining agreement so provide (Pet. App. 35). The state court concluded that, apart from the strike settlement agreement, the arbitrator did determine that Needham had a legal right to discharge the striking employees (Pet. App. 35).* Since the court could plainly perceive that the arbitrator's own conclusions and findings demonstrated that his authority was derived "from sources outside the collective bargaining agreement at issue," it vacated the award as being beyond his jurisdiction and in excess of any authority conferred upon him by the collective bargaining agreement (Pet. App. 36).

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* The arbitrator found no employer waiver or condonation of the inexcusable strike or, for that matter, of the subsequent strike misconduct after May 16th.

REASONS FOR DENYING THE WRIT

1. The Petition Poses No Issue Respecting the Scope of Judicial Review of Arbitration Awards Which Has Not Previously Been Decided by This Court

In a number of decisions in recent years, this Court has clearly set forth the guiding principles governing the role of the judiciary in the enforcement of arbitration awards rendered under collective bargaining agreements. This Court has expressly stated that the scope of judicial inquiry under § 301(a)* embraces the determination of whether the parties agreed to give the arbitrator the power to make the award he made. "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582. "[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *Id.* at 582. The decisions of this Court leave no doubt that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241.

The very submission of a dispute to an arbitrator does not vest him with unrestrained authority to do as he chooses. As this Court has succinctly observed:

> "[The arbitrator] does not sit to dispense his own brand of industrial justice. He may of course

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* § 301(a) of the Labor-Management Relations Act, 61 STAT. 156, 29 U.S.C. § 185(a).

> look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597.

No doubt exists that under the controlling principles established by this Court, judicial review of an arbitrator's award is a limited one. Nevertheless, when a court can *clearly perceive* from the facts determined by the arbitrator that the arbitrator has exceeded the authority conferred upon him by the parties to resolve the dispute in issue, enforcement of the award must be denied. *Torrington Co.* v. *Metal Products Workers Union*, 362 F. 2d 677, 680 (C.A. 2 1966).

In the *Torrington* case, *supra*, the issue confronting the court was whether the arbitrator's award should be enforced. The court denied enforcement on the grounds that it was "sufficiently clear from the facts found by the arbitrator" that the "arbitrator exceeded his authority" when he determined that the parties had impliedly agreed that election day benefits were embraced by the collective bargaining agreement. The Second Circuit, speaking through Chief Judge Lumbard, and in reliance upon this Court's decision in *Enterprise Wheel*, held that,

> ". . . the question of an arbitrator's authority is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted where the reviewing court can *clearly perceive* that he has derived that authority from sources outside the collective bargaining agreement at issue. See Textile Workers Union of America

v. American Thread Co., 291 F. 2d 894 (4 Cir. 1961)." 362 F. 2d at 680.*

Other circuits, when faced with the enforceability of an arbitrator's award, have similarly refused to enforce the award where "its essence" was not drawn from the bargaining agreement between the parties. *Kansas City Luggage & Nov. Wkrs. U.* v. *Neevel Luggage Mfg. Co.*, 325 F. 2d 992 (C.A. 8 1964); *H. K. Porter Co.* v. *United Saw, File & Steel Prod. Wkrs.*, 333 F. 2d 596, 600 (C.A. 3 1964).

It was precisely to the point of whether the arbitrator exceeded his authority in making the award he did that the Iowa Supreme Court directed its attention. The scope of its inquiry was clearly proper in accordance with the general principles already enunciated by this Court. The Union has made no showing which should impel this Court to grant review. Particularly review should be denied where, as here, the state court has conscientiously applied the principles established by this Court in resolving the issues before it.

2. In Refusing To Enforce the Arbitration Award the State Court Adhered to and Applied the Controlling Principles of Federal Labor Law Established by This Court

The ultimate conclusion of the Iowa Supreme Court which led it to refuse enforcement of the arbitrator's award was succinctly summarized in one sentence:

> "The 'arbitrator's words manifest an infidelity' to his obligation to draw the 'essence' of the authority and award from the collective bargaining agreement." (Pet. App. 36.)

That this conclusion was reached by the state court without re-examination of the underlying facts and

* Emphasis supplied unless otherwise noted.

based upon the arbitrator's findings and award itself, is made manifest by the majority opinion of the state court.*

In no way did the state court undertake to weigh the culpability of the strikers, the quantum of discipline, or the merits of the dispute. The state court expressly heeded the admonition of this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568, that it was not "permitted to re-examine the merits of the aribtration decision." (Pet. App. 29.) It confined itself to a review of the arbitrator's own "repeatedly expressed" findings and conclusions (Pet. App. 29). Based upon that review, it concluded that the arbitrator had exceeded his authority and derived his jurisdiction from "agreed upon terms" to settle the strike rather than from within the four corners of the collective bargaining agreement (Pet. App. 35).**

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* It is important to note that the Iowa Supreme Court did not conclude that the arbitrator's conclusions of law and fact were ill-founded. Rather, on the basis of the arbitrator's own conclusions of law and fact, the court could *clearly perceive* that the arbitrator exceeded his authority.

** Contrary to the Union's contention (Pet. 11-13), the Supreme Court of Iowa was not "confused" when it characterized the grievance as one for the wrongful discharge of employees based upon a violation of "agreed upon terms." It was the Union's contention throughout that because of such "terms," all employees would be taken back without discrimination and the new men would have to go. It is clear that for the Union to prevail, the arbitrator would have had to find a new and separate agreement between the parties. Thus, in purporting to resolve Grievance 2-A in favor of the Union, the arbitrator necessarily determined that there was a new agreement which had been violated by Needham. The Union has consistently argued that it was the breach of the new agreement, without the restoration of normal relations, that in some way turned the illegal strike into a lockout. But on the Union's own theory for this to come about, there would have had to be, at the least, a new agreement which was violated.

The Union's grievance was that the striking employees had been "improperly discharged." Needham, according to the arbitrator, had the "legal right" under the collective bargaining contract to discharge the striking employees. (See Statement, p. 12, *supra;* Pet. App. 33, 34.) What the arbitrator tried to do was turn a discharge for just cause under the collective bargaining agreement into an improper deprival of seniority by virtue of the repudiation of a separately negotiated strike settlement agreement. Without regard to the merits,* the state court held that the findings and conclusions of the arbitrator plainly disclose that he had derived his alleged authority to make the award he made from his understanding of the independent strike settlement agreement. This exercise of authority, the state court said, the parties had not bargained for. Contrary to the Union's claim that the state court had "plunged full-scale into the merits" (Pet. App. 11), it did no such thing. The decision of the state court is a fully reasoned one. But this does not mean that the court weighed the merits. The state court simply responded to the Union's argument by applying to the particular undisputed facts of this case the teachings of this Court as established by *Enterprise Wheel, supra; Warrior & Gulf, supra;* and *Atkinson, supra.*

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* Indicative of the fact that the state court did not concern itself with an "analysis of the merits" (See Pet. 13) and that it did not become "tangled in the merits" (See Pet. 13) was its refusal to make any determination respecting the terms of the alleged strike settlement agreement. Thus, the court refrained from deciding whether or not the Union was "right or wrong." It specifically noted, "proof that the Company violated [the strike settlement agreement] . . . would subject the company to damages. This is not for us to decide." (Pet. App. 35-36.)

To urge, as the Union does here, that courts must be totally blind to the factual considerations allegedly giving rise to the arbitrator's authority to decide the issue he did would make meaningless any application of the principles of *Enterprise Wheel, supra.* The merits of the dispute have no bearing on the question of whether the dispute decided by the arbitrator was one the parties agreed to arbitrate. In response to the same argument advanced by the Union in *Torrington Co.* v. *Metal Products Workers Union, Local 1645,* 362 F. 2d 677 (C.A. 2 1966), Judge Lumbard aptly noted (fn. 6, 362 F. 2d at 680):

> "Of course, it can be argued that our decision authorizes an impermissible review of the 'merits' in a case where the principal issue was whether the arbitrator should find an implied substantive obligation in the contract, see Meltzer, the Supreme Court, Arbitrability, and Collective Bargaining, 28 U. Chi. L. Rev. 464, 484-85 (1961), but we think this position is contrary to *Enterprise Wheel.* . . . The question of the arbitrator's authority is really one of his contractual jurisdiction, and *the courts cannot be expected to place their stamp of approval upon his action without making some examination of his jurisdiction to act.* As stated above, we think more exhaustive judicial review of this question is appropriate after the award has been made than before the award in a suit to compel arbitration; in this way, the court receives the benefit of the arbitrator's interpretive skills as to the matter of his contractual authority. See Livingston v. John Wiley & Sons, Inc., 313 F. 2d 52, 59 n. 5 (2 Cir. 1963), Aff'd 376 U.S. 543, 84 S. Ct. 909, 11 L.Ed. 2d 898 (1964)."

The Iowa Supreme Court was well aware of the limited review which this Court has observed falls

within the scope of proper judicial inquiry. By reference to decisions of this Court, it recognized that "the processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware," *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (Pet. App. 20); it acknowledged that state and lower federal courts have been enjoined by this Court not to question mere ambiguities in an arbitrator's decision, *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (Pet. App. 21, 36); and it expressly adverted to "the federal policy of settling labor disputes by arbitration," *Id.* at p. 596 (Pet. App. 21).*

Bearing in mind the limitations on its jurisdiction, the state court ultimately predicated its denial of enforcement of the arbitrator's award upon one basic legal principle which has been emphasized, affirmed and reaffirmed by this Court: "arbitration is a matter of contract and parties cannot be compelled to arbitrate a question which they have not agreed to arbitrate." (Pet. App. 27.) In reviewing the arbitrator's award in the light of this guiding principle, the state court determined that the parties had not agreed by their collective bargaining agreement to confer authority upon the arbitrator to determine disputes arising out of a strike settlement agreement** and that the strike settlement agreement did not itself provide for arbitration of disputes arising thereunder.

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* In making the award he made, the arbitrator did not consider, or even advert to, any "custom and practices" of the plant or the industry. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-597. No issue respecting such considerations was involved in the state court's decision.

** Any strike was prohibited under the terms of the collective bargaining agreement.

To obfuscate the import of this decision, the Union implies that in making it, the state court had indulged in an "impermissible" resolution of ambiguities in the arbitrator's decision (Pet. 11, 13). The Supreme Court of Iowa specifically dealt with this point in its opinion. It noted that the difficulty in the arbitrator's decision presented a more basic problem than mere ambiguity (Pet. App. 36). It concluded that the arbitrator's "finding of arbitrability" was inconsistent and irreconcilable with his other findings and conclusions (Pet. App. 36). Based on these "other findings and conclusions" in their totality, the state court could *clearly perceive* that the arbitrator drew his authority to decide the issue he did from the "agreed terms" for settlement of the strike and did not act within the authority granted to him by the parties.

Even if the arbitrator had not articulated the basis of his authority and award, the Supreme Court of Iowa was justified in setting aside the award because its essence was not drawn from the collective bargaining agreement but rather from sources outside of it. Nor can an arbitrator preclude judicial review of his power to act just because he says that the issue of "arbitrability" is "indissolubly linked with the merits." (Pet. 12.) And an arbitrator is entitled in the arbitration process to make mistakes so long as they do not involve perverse errors or gross misconduct,* but his mistakes cannot confer authority upon him where none exists.

In the final analysis, the position of the Union is that, simply stated, it is unhappy with the decision of

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* See, by way of analogy, United States Arbitration Act, 61 STAT. 669, 9 U.S.C. § 10. In deciding the case as it did, the Supreme Court of Iowa did not have to reach the issue of whether or not the arbitrator engaged in misconduct.

the Supreme Court of Iowa and would like to have another court review the case. It can point to nothing said or done by the state court which was not wholly in accord with the principles established by this Court governing the scope of judicial inquiry. To enforce or not to enforce an arbitrator's award is peculiarly within the province of the reviewing court pursuant to guidelines established by this Court. Re-review by this Court of the informed judgment of the highest court of the State of Iowa is, we submit, not warranted here.

3. The Decision of the State Court Is Not in Conflict With the Decisions of Other State or Lower Federal Courts

The Union baldly asserts that the decision of the Supreme Court of Iowa is "reflective of views at odds" with the decisions of other courts. (Pet. 15).* In support of this assertion, it cites *International Molders & F.W.U.* v. *Susquehanna Cast. Co.*, 283 F. 2d 80 (C.A. 3 1960); *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4 1963), *cert. denied*, 375 U.S. 818; and *Trailways of New England, Inc.* v. *Amalgamated Ass'n, etc.*, 343 F. 2d 815 (C.A. 1 1965), *cert. denied*, 382 U.S. 940.

None of these decisions is apposite here. All three cases were to compel arbitration and involved the duty

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* The Union does hedge this assertion by relating it to the *"original decision"* of the Supreme Court of Iowa as well as *"its most recent one."* (Pet. 15.) It is true that the cited cases run counter to the original decision of the Supreme Court of Iowa which this Court subsequently reversed. In fact, this Court's decision in the prior appeal of this case is cited by the court in *Trailways* as support for its holding. But it advances the Union's position not at all to urge as a reason for granting its Petition that a prior decision of the state court, subsequently reviewed and reversed by this Court, may have been at "odds" with decisions of other courts.

of an employer to arbitrate grievances arising out of the discharge of striking employees.* Any doubt as to the existence of such a duty was put to rest by this Court in *Drake Bakeries, Inc.* v. *Local 50,* 370 U.S. 254; *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238; and the decision of this Court in the prior appeal to it of this case, *Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247. No such issue is presented by the Union's petition here nor was it involved in the decision of the state court of which review is sought.

The only lower state court decisions treating with strike settlement agreements and cited by the Union in its petition are the *Torrington* cases.** Nowhere in its petition does the Union take issue with the decisions in the *Torrington* cases, nor did the Union do so in its presentation before the Supreme Court of Iowa (Pet. App. 28).

In the *Torrington* situation, the union and the employer entered into a new collective bargaining agreement in settlement of a strike. The dispute arose during the strike and persisted after it was settled. The union asked for relief on the basis that an agreed upon recall arrangement was subject to arbitration. As is the case here, the issue in the first of the *Torrington* cases concerned the arbitrability of disputes with respect to the recall of strikers. The new agreement

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* None of these cases is concerned with whether an arbitrator exceeded his authority in making the award he made.

** These cases arose out of an economic strike by the Metal Products Workers Union against the employer, Torrington Company. They are reported at 347 F. 2d 93 (C.A. 2 1965); 59 L.R.R.M. 2588, *cert. denied,* 382 U.S. 940; 358 F. 2d 103 (C.A. 2 1966), 62 L.R.R.M. 2013; and 362 F. 2d 677 (C.A. 2 1966), 62 L.R.R.M. 4295. The Union's petition erroneously states that the state court relied on the first two of these reported decisions. Actually, the state court cited only the first and third of these reported cases in its opinion.

contained a limited arbitration clause, as did the collective bargaining agreement in Needham,* providing for arbitration only of disputes *with respect to the interpretation or application of the provisions of the collective bargaining agreement.* 347 F. 2d at 95 (C.A. 2 1965), *cert. denied,* 382 U.S. 940.

In *Torrington,* the court held that:

> "It is obvious that on their face the provisions of the collective bargaining agreement do not purport to provide for arbitration of controversies arising out of recall of strikers. . . .
>
> "Controversies concerning recall to work after a strike are not prima facie, at any rate, grievances 'with respect to the interpretation or application' of any of the provisions of the usual collective bargaining agreement. And the collective bargaining agreement between the parties to the present case contains no provisions which expressly relate to the recall of strikers. Provisions of the collective bargaining agreement are not directly relevant to recall of strikers. In order to apply them to this situation for which they were not designed they must be adapted or selected by analogy. If, therefore, the collective bargaining agreement, including the arbitration clause, is applicable to the recall grievances it must be because there is some special

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* See Statement fn, p. 4, *supra.* Compare broad arbitration clauses, such as:

> "Should differences arise between the Company and the Union or its members . . . as to the meaning and application of the provisions of this Agreement, *or should any local trouble of any kind arise. . . .*" *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574, 576.
>
> "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or *any act or conduct or relation between the parties hereto, directly or indirectly.*" *Drake Bakeries* v. *Local 50,* 370 U.S. 254, 257.

> agreement making it applicable or because of some custom or common understanding which has that effect."

Relying upon the decisions of this Court in *Warrior & Gulf, supra, Atkinson, supra,* and *Wiley & Sons* v. *Livingston,* 376 U.S. 543, the Court of Appeals for the Second Circuit held that it was the duty of the *court,* not the arbitrator, to decide the factual issues between the parties as to whether they "every entered into an agreement to arbitrate" disputes over the recall of the strikers. 347 F. 2d at 95, 96.

The decision of the Supreme Court of Iowa is wholly in accord with the reasoning of the court of appeals in *Torrington.* The Union's attempt to distinguish the *Torrington* cases in its colorful characterization of the state court's holding as an "absurd result" traceable to "misplaced reliance" on *Torrington* (Pet. 14) is without substance. Whether or not the dispute with respect to the terms of return of strikers arose under an existing collective bargaining agreement or as a grievance under a strike settlement agreement was of no relevance to the state court in its application of the reasoning of the *Torrington* case to this case. As is apparent, the terms of the alleged Needham strike settlement agreement included no reference to the arbitration of disputes with respect to the recall of the strikers. Nor does the Union claim otherwise. And, as the Supreme Court of Iowa specifically noted,

> "It cannot be implied that the arbitration clause [of the collective bargaining agreement] was intended to include an agreement to arbitrate the return to work after an illegal strike when a strike was prohibited under the terms of the agreement." (Pet. App. 35.)

The Supreme Court of Iowa did no more than resolve the factual issues of whether or not the parties had in

fact voluntarily submitted* to arbitration a "dispute over the return to work after an illegal strike." (Pet. App. 35.) This issue was clearly cognizable by the state court as was recognized by the court of appeals in *Torrington*.

The Union's claim that the decision of the Supreme Court of Iowa is in conflict with decisions of other state or lower federal courts or that the decisions of these other courts had been misapplied is without merit.**

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* In the second of the three *Torrington* cases, the parties voluntarily submitted the very question of arbitrability to an arbitrator and entered into a written agreement which so provided. The arbitrator found that the issue was not arbitrable and his award was upheld against a motion to vacate by the union. 358 F. 2d 103, 105-106.

** The Respondent is unaware of any reported case in which the following combination of major factors occurred, as in Needham:

(a) An illegal authorized strike of mass proportions by the officers and men of virtually an entire bargaining unit.

(b) The bringing in by the company of a major portion of a new working force under a firm policy, clearly enunciated in advance to the strikers, that satisfactory replacements would not be let go to make room for returning strikers.

(c) Express factual findings and conclusions by the arbitrator that (i) the employer had the right to discharge the employees, (ii) discharge was not too severe a penalty, and (iii) the employer had a clear legal right to bring in and keep the replacement men.

(d) A sequence of events under which the union reiterated its position that unless all of the strikers were returned immediately, with full seniority, none would return.

(e) A primary claim by the union that the gravamen of its grievance is that the parties had reached "agreed upon terms" (denied by the company) for the return of the men to work, but that the company repudiated that agreement after the union voted to accept it and that the strikers had no duty to return to work until the company lived up to such agreement.

(f) A clear and unmistakable recognition by the arbitrator that the basis of his authority to decide the grievance rests upon his view that there were "agreed upon terms" for the return of the men to work.

4. The Issue Decided by the Supreme Court of Iowa Was Not Decided by This Court or Presented to It for Decision in Its Prior Review of This Proceeding

The events giving rise to this proceeding were earlier reviewed by this Court upon appeal from the holding of the state court that "the Union had waived its right to arbitrate the grievance filed by its walkout." 376 U.S. 247, 249. Two grievances as framed by the Union were then in issue. The first grievance alleged the improper discharge of the shop steward and the second alleged the improper discharge of approximately 185 employees.

Directing attention specifically to the "grievance procedures" providing for arbitration of disputes "with reference to the proper interpretation or application of the provisions" of the collective bargaining agreement (376 U.S. at 250), this Court observed:

> "There is no question in this case that the union's claim of wrongful discharge is one which Needham agreed to arbitrate." 376 U.S. at 252.

This Court then held, "Needham's allegations by way of defense and counterclaim that the union breached the no-strike clause, supported by such facts as were undisputed on the pleadings, did not release Needham from its *duty to arbitrate* the union's claim that employees had been wrongfully discharged." 376 U.S. at 253. This Court's decision was a narrow one indeed.

At three places in its petition, the Union represents that by its decision this Court held that the grievances were arbitrable. At page 2 in the first question presented, the Union states, "following a decision by this

Court that certain grievances were arbitrable;" at page 4 the Union observes, "the grievances arbitrated were the two grievances which this Court had held were arbitrable;" and at page 13 it notes, "despite the fact that Grievance No. 2-A was held by this Court to be arbitrable. . . ." We respectfully submit that this Court made no such determination. In this respect our views are in accord with those of the Arbitration Board which subsequently arbitrated the grievances. At the outset of his decision, the Chairman announced:

> "It is perhaps desirable (although probably unnecessary) to underline here that the Supreme Court made no finding that the instant grievances were arbitrable. Its holding was simply that Needham was not released from its duty to arbitrate on the basis that the Union had breached the no-strike clause . . . in terms of the facts that were undisputed on the pleadings as the matter came before the Supreme Court." (A.D. 26.)

We believe that the import and holding of this Court's prior decision was only that the strike did not relieve Needham of its "duty to arbitrate" Union grievances which by their terms were embraced by the provisions of the collective bargaining agreement. Immediately following this Court's prior decision, the Supreme Court of Iowa directed the lower state court to enter an order compelling arbitration without the taking of further evidence. This is precisely what this Court said that the Iowa Supreme Court should do and all that it said it should do.

The case now is in exactly the same posture as though the parties had voluntarily submitted the dispute to arbitration in 1961 when the grievances were filed and

the case unfolded before the arbitrator and the state courts as it subsequently did. Nothing in this Court's prior decision precluded the Supreme Court of Iowa from entertaining the judicial review entrusted to it by § 301 of the Labor-Management Relations Act, as interpreted by this Court.

The distinction between the court's function in determining whether to compel arbitration as compared to its function in enforcing (or setting aside) an arbitrator's award has been ably noted in *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F. 2d 238 (C.A. 5 1961), a suit to compel arbitration.

> "To compel arbitration in the first instance is not to approve *carte blanche* in advance any decision which might be reached. The arbitrator is not a free agent dispensing his own brand of industrial justice. And if the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts." 296 F. 2d at 242.

And to emphasize the point that the "duty to arbitrate" does not remove from judicial scrutiny the award made, the court said,

> "We make doubly plain that this opinion in no way indicates what, if any, decision an arbitrator should or must make. We hold merely that he should determine the grievance. Whether the decision or the remedy prescribed is, or is not, supportable is for another day." 296 F. 2d at 244.

The issue decided by the Supreme Court of Iowa was whether or not the parties had agreed to confer upon the arbitrator the authority to make the award which

he did.* That issue was clearly within the province of the court and had not previously been decided by this Court.** The expedient argument advanced by the Union that the decision of the Supreme Court of Iowa is in direct conflict with the prior holding of this Court is, we submit, untenable.

5. No Issue of "Considerable Importance" in the Administration of Federal Labor Laws Is Posed by the Petition

In its Petition, the Union urges that "the issue is one of considerable importance in the administration of Federal labor laws." (Pet. 14.) To what precise

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* It is precisely in the determination of this issue that the dissenting justices misconceived the proper scope of judicial inquiry. While concurring in the view that this Court "did not decide" whether or not the grievances here in issue were arbitrable (Pet. App. 37), the resolution of that issue from the viewpoint of the dissenting justices is limited to determining whether or not the parties had a continuing "duty to arbitrate." Thus, the minority concerned itself solely with the question of whether or not the Union and the striking employees had by their conduct so totally breached the contract as to terminate the contractual relationship with Needham, including its "duty to arbitrate." As previously noted, the majority found it unnecessary to reach this issue. See Statement, fn., pp. 10-11, *supra*. And for the purposes of their decision, the majority justices assumed that Needham had a continuing duty to arbitrate. As has been pointed out in this Brief, the confines of judicial review are not so circumscribed as to preclude review of the arbitrator's award, when made. Unless the parties have agreed to submit to arbitration the particular grievance or have conferred upon the arbitrator the authority to make the award which he made, the award cannot be judicially enforced. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582. What the dissenting justices did was to abdicate their judicial responsibilities and relinquish their proper role to the arbitrator.

** The prior litigation arose under Rule 105 of the Iowa Rules of Civil Procedure. It is clear the Supreme Court of Iowa concluded that the prior litigation under Iowa rules did not preclude it from denying enforcement of the arbitrator's award.

"issue" the Union is referring is unclear. The gist of its position is apparently that if its Petition is not granted, union officials "might be fearful" (Pet. 15) to enter into strike settlement negotiations where there has been an illegal walkout. This claimed caution, so the Petition observes, might stem from a concern that grievances over discharges growing out of the strike would be subject to a strike settlement agreement (Pet. 15).*

The Union's observation is not apropos of anything said or done by the Supreme Court of Iowa. That court did not hold that grievances over discharges growing out of a strike were not subject to the collective bargaining agreement. What the court did hold is that disputes arising under a new agreement as to matters not covered by the old agreement were not subject to arbitration unless the parties had agreed to make them so.

The Union's position simply does not jibe with its own affirmative thesis—always maintained—that there was just such a strike settlement agreement; that Needham breached it; and that the striking employees were

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* The Union has supplied no citation of authority for its broad representation that "few strike-settlement agreements contain arbitration clauses." (Pet. 15.) We note, however, that a strike-settlement agreement, as any other agreement, is a contractual arrangement between the parties which can include a procdure for arbitration if the parties so agree. We also note that in the "Wilson situation" involving the same International union as here (see fn., p. 6, *supra*), the strike-settlement agreement did include a clause providing for arbitration of any dispute "relating to the status of strikers and employees hired as replacements" for the strikers. *Bixby* v. *Wilson & Company*, 196 F. Supp. 889, 891 (N.D. Iowa 1961). In this case, Needham's position was at all times, without dispute, that it would not tolerate another "Wilson" situation.

not required to return to work except under the new terms of the strike settlement agreement. Stripped of its niceties, the real concern of the Union is that it cannot by means of the pressure of an illegal strike force an employer into a settlement agreement which contravenes the employer's rights under the old agreement and still be able to avail itself of the limited arbitration procedures under the old agreement with respect to disputes arising under the new agreement. In not permitting this, all the Supreme Court of Iowa did was to apply and reaffirm the principle that arbitration is a matter of contract and parties cannot be compelled to arbitrate a question which they have not agreed to arbitrate (Pet. App. 27).

Federal labor policy would be wholly frustrated if the courts were to permit any deviation from this basic principle. If the courts were to do so, collective bargaining agreements respecting grievance-arbitration would lose all sanctity. Far from thwarting national labor policy, the peaceful and prompt resolution of disputes through the grievance-arbitration procedure will be fostered if the parties realize that only those issues which they have agreed to submit to the arbitrator will be decided by him. These basic considerations were aptly enunciated in *Torrington Co.* v. *Metal Products Workers Union,* 362 F. 2d 677, 682 (C.A. 2 1966). There the court set aside an arbitrator's award where the parties had not agreed that the arbitrator had authority to act. As Chief Judge Lumbard observed:

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the 'merits' of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary re-

sort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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